SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.

WAREHOUSEMEN'S UNION, LOCAL 117, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Specification of Error.

1. The United States Court of Appeals for the District of Columbia erred in affirming the power of the Board arbitrarily to repudiate the results of an election ordered and conducted by it.

2. The court below erred in upholding the Board's construction of the Truce Agreement on which the closed-shop contract was predicated and in finding that it was the intent of the parties that the Truce Agreement become inoperative

in the event of the secession of the I. L. A. local from the I. L. A. and the American Federation of Labor.

3. The court below erred in upholding the Board's order directing the employer to disregard its collective bargaining contract with the Teamsters' organization.

4. The court below erred in upholding the Board's order denying petitioner the right to represent any of the employees of McKesson & Robbins, Inc., in the two warehouses in question.

ARGUMENT.

I.

The Board acted arbitrarily and in excess of its power in directing the election and then repudiating the result.

The mere statement of the Board's action in ordering an election and then repudiating the result without rhyme or reason speaks for the invalidity of such action. Granted that the Board's discretion in the conduct of proceeding under Section 9 and Section 10 of the Act is extremely broad, nevertheless, this discretion is one which cannot be exercised in an arbitrary manner and in a manner in disregard of its own proceedings.

As we have seen, the representation hearings on the C. I. O. petition required inquiry into the entire circumstances of the making of the Truce Agreement and the making of the closed-shop contract. Before a decision was reached in the representation case, the C. I. O. filed charges against the Company based solely on the alleged invalidity of the contract. The Board, nevertheless, ordered a predated election to which the C. I. O. made no objection. The Teamsters' union won the election, but the Board refused to follow the Regional Director's recommendation that the Teamsters be certified, instead proceeding on the charges previously filed. The decision in the unfair practice case

was based upon reasoning exactly similar to that employed in the representation decision, and indeed upon the same record.[1]

Why the action of the Board in this case is arbitrary, and why the proceeding in the representation case must necessarily constitute a bar to the proceeding in the unfair practice case, becomes obvious when the two proceedings are compared and when there is noted the identity of the issue in each case and the complete inconsistency of their purposes. Petitioner recognizes, of course, that, for the most part, representation proceedings under Section 9 of the Act differ from unfair labor practice proceedings under Section 10 of the Act, the purpose of the one being primarily to ascertain majority representatives and determine bargaining units, and the purpose of the other being to remedy unfair labor practices on the part of employers. However there are certain limited classes of cases where the issue in a representation proceeding is identical with the issue involved in an unfair practice proceeding. These involve representation cases where a contract is asserted as a bar to an election in a representation proceeding and the Board ascertains whether the person asserting the contract represented a majority at the time the contract was made, and complaint cases where the employer's sole unfair practice is the making of a closed-shop contract with a minority group. The Board itself notes the similarity of these classes of cases. See Third Annual Report, page 134; Fourth Annual Report, page 74; Fifth Annual Report, page 55. In these cases, as in the present case, the issues in both types of proceedings are identical and the evidence is identical, both relating to the existence of a majority. A demonstration of the lack of a majority in either case is sufficient to constitute

[1] The entire record of the representation hearing was stipulated as part of the record in the unfair practice hearing and constituted the major portion thereof (R. 223-224).

the employer's action in entering into such contract with the minority group a violation of the Act.

In both the representation and unfair practice hearings in the present case the evidence concerned itself solely with the circumstances surrounding the making of the Truce Agreement, in reliance on which the closed-shop contract was entered into. The inconsistency in the two proceedings in this case arises from the different objects of each. It was the object of the representation proceeding to ascertain and designate a majority bargaining representative—to *grant rights of exclusive recognition* to the winner of the election conducted by the Board. It was the purpose of the unfair practice proceeding to *deny or deprive an organization of exclusive bargaining rights* if that organization did not represent the majority—to require the employer to cease from recognizing or dealing with that group as exclusive representative. Proceeding to an election in the one case is directly negated by a proceeding to unseat the representative in the other hearing. If one of the organizations participating in the election was not entitled to bargaining rights as asserted in subsequent proceedings based upon facts known to the Board at the time it ordered the election, then, of course, it was meaningless to order and conduct such election.

What the Board, in effect, is arguing for in the present case by insisting on the difference between the two types of proceedings conducted by it under Section 9 and Section 10 of the Act, in spite of the identity of the issues and evidence in classes of cases like the present one, and in spite of the inconsistency of the purpose of each, is the power to take away with its left hand what it has given with its right. That is the essence of the Board's procedure in this case, and its claim to exercise such power is manifestly in disregard of all principles of equitable procedure and of fair

play, and is not to be obscured by the drawing of superficial distinctions.

It may be true, as asserted by the court below, that the mere finding by the Board that the closed-shop contract was not a bar to the election did not in itself determine whether there were or were not unfair practices. However, *in going further and ordering an election,* determination as to the existence of unfair practices necessarily must have been made, for the reason (1) that the Board does not, and could not be expected to, conduct an election where the free choice of the employees might be affected by unfair practices (see Third Annual Report, page 143; Fourth Annual Report, page 77; *Matter of American-France Line, etc.,* 3 N. L. R. B. 64), and (2) it cannot be presumed that the Board would do a vain or useless thing, and therefore, in ordering an election, it must have considered an election proper and truly expressive of the free choice of the employees.

The election was voluntarily participated in by the C. I. O.; the Board itself conducted and supervised the balloting; there was no charge of any interference or coercion at the time of the election; the Teamsters won the election; and the Regional Director recommended certification. The Board, however, refused certification, not on the basis of any new circumstances, not on the basis of any new charges, but solely on the basis of charges pending when it had ordered the election and upon the basis of facts brought forth and known to it prior to the time it ordered the election.

The sole excuse offered by the Board for this extraordinary procedure was that it had no knowledge of the pendency of the charges of unfair labor practices at the time it ordered the election.

One answer to this contention is that the evidence at the representation hearing, and discussed at length in the deci-

sion, was sufficient in itself to constitute notice of the possibility of unfair practices. Another and shorter answer is that the Board's own Rules and Regulations (Article II, Section 2) specifically provide that charges of unfair practices can be filed only with the Regional Director. In what manner other than filing charges with the Board's agent, as required by the Board's rules, the Board can be put on notice of such charges, the Board does not attempt to state.

The court below and the Board argue that under Section 9(c) of the Act representation proceedings and unfair practice proceedings may be conjoined, and that that is in effect what was done here. However, it is not possible to conjoin such proceedings after the event. When an election has been ordered, it is too late to join the proceedings, for it is the purpose of joining unfair practice proceedings with representation proceedings to remedy any unfair practice which might affect the free choice of the employees *prior* to holding the election contemplated in the representation case. For obvious reasons, it is only *after* the unfair practices have been remedied that the Board orders and conducts an election. See *Falk Corp.* v. *N. L. R. B.*, 308 U. S. 453.

The remarks of Chief Justice Groner, in his dissenting opinion, characterizing the Board procedure as arbitrary, succinctly sum up the arguments:

> "I understand that the purpose of the National Labor Relations Act is to insure to employees an opportunity for a free determination of the union to represent them in their relations with the employer. The certain method of ascertaining the preference is a fair and untrammeled election. Putting to one side, therefore, the question whether in the present instance all the parties were bound by the so-called truce agreement on the jurisdictional question, as in good faith they undoubtedly were, I am nevertheless of opinion that the Board,

in ordering and holding an election and then repudiating the result, has acted arbitrarily.

"1. The election was ordered with the full knowledge on the part of the Board that the employer, acting under the binding conditions of the truce agreement, had signed the closed shop contract with the Teamsters.

"2. It was obviously its purpose to determine which of the unions represented the majority of the men.

"3. There was neither charge nor evidence of coercion of the electorate on the part of the employer.

"4. The persons eligible to vote were designated by the Board.

"5. The election was conducted by the Board, and the employer took no part in it.

"6. No one claims it was not fairly held and the result fairly determined.

"7. The Board was then as fully informed of all the charges on which it subsequently acted as it was when it later repudiated its own action and set aside and annulled the election.

"In the circumstances, I am wholly unable to find any justification for its course, and I am even more unable to find justification for its further action in ordering the employer not to recognize Teamsters as the bargaining representative 'of any' of its employees when the only evidence in hand showed that union as the choice not only of many but of an established majority."

Two very obvious results of countenancing the Board's procedure in this case are these: (1) it would permit the Board to conduct elections and then repudiate the result where a labor organization it did not favor won the election; by conducting a series of elections it could insure victory for any organization it might prefer; (2) the order-

ing of elections, the participation in them by competing unions, and the Board's repudiation of the result on the basis of facts known to it prior to the time it ordered the election, would inevitably result in industrial turmoil—protest strikes and protest picketing. It is impossible to conceive of any purpose of the Act that could be effectuated by the procedure sanctioned by the court below. It cannot be that the Board was attempting to protect the interests of the C. I. O. local or its members, because that local and its members freely and voluntarily participated in the election, expecting to abide by its result. It cannot be that the Board was attempting to preserve industrial peace, for industrial peace did exist from the time of the contract of November 15th until the Board's order repudiating the contract over two years later. The ordering and holding of a formal election is a serious matter, not to be lightly undertaken or arbitrarily disregarded. Employees are keyed up to the election for weeks ahead of time; organizational activities are increased, and all the tension of an important political campaign obtain. It cannot reasonably be expected that an organization which has won such an election, ordered and conducted by the Board and fairly participated in by all employees, would willingly consent not only to a subsequent repudiation of the results of that election based solely on facts known to the Board when the election was ordered, but, in addition, an order directing the employer not to deal with it for any of its members. If the policy and purposes of the Act are to be achieved, surely a sensible and reasonable precaution to that end would be to refuse to countenance arbitrary exercise of power asserted by the Board in this case.

It is submitted that the decision of the court below has sanctioned a departure from the accepted and usual course of judicial proceedings, which, moreover, is in derogation and not in furtherance of the purposes of the Act, and that

this Court should exercise its power of supervision to control the arbitrary exercise of power contended for by the Board in this case.

II.

The court's construction of the truce agreement, on which Board-repudiated contract was based, is erroneous.

The second issue in this case relates to the interpretation of the Truce Agreement of June, 1937. Petitioner asserts that the court below in its construction of that agreement failed to apply applicable decisions of this Court, of the Federal circuit courts and of the courts of the State of Washington where the agreement was entered into.

The significance of the Truce Agreement, of course, is that it constitutes the basis and the justification for the closed-shop contract of November 15th. Compliance with the Truce Agreement would afford the majority required for a closed-shop contract. As before explained, the issue in the unfair practice case was simply whether the Teamsters had represented a majority of the employees when the closed-shop contract was entered into. There was no contention that the employer violated the Act in any respect other than to have made a contract with the minority. The employer is not charged with having interfered with or coerced its employees or having afforded assistance to the Teamsters in obtaining their membership.

Since the parties had entered into the closed-shop contract primarily in reliance on the Truce Agreement, it is necessary to examine the meaning and intent of that agreement to see whether it in fact bound the individual signatories thereto to compliance with the decision of the American Federation of Labor Convention and consequent change of affiliation, regardless of a subsequent secession of the I. L. A. local from the International organization and from the American Federation of Labor. Petitioner asserts

the agreement did so bind the employees signing it; the Board found that the agreement was not intended to so bind the employees, and its construction of the agreement was upheld by the court below.

The issue respecting the validity of the Truce Agreement under the National Labor Relations Act, assuming the Teamsters' interpretation was correct, was not passed upon by the Board or by the court below, although argued and briefed before the latter body. In this respect, however, it might be said that the binding effect of individual or collective commitments as to retention of affiliation during their terms have been affirmed in recent decisions of the circuit courts *National Labor Relations Board* v. *Electric Vacuum Cleaner Company, Inc.*, 120 F. (2d) 611 (individual designations of bargaining representative for year period held to preclude attempt to change affiliation during such period); *Peninsula & Occidental S. C. Co.* v. *National Labor Relations Board*, 98 F. (2d) 41 (employees held precluded from attempting to change representative during term of preferential shop contract);—by the New York Court of Appeals and Errors in the matter of *Triboro Coach Corporation*, decided July 29, 1941, L. R. R., Vol. VIII, page 845 (employees held precluded from changing affiliation during term of two-year collective bargaining agreement)—and by the Board itself in the case of *Ansley Radio Corporation*, 18 N. L. R. B., No. 108, and in the case of *Douglas and Lomason Co.*, 34 N. L. R. B. No. 8.

Indeed, any attempt to secure security and stability through collective bargaining relationships would clearly seem to require adherence to reasonable commitments as to affiliation and choice of bargaining agent when freely entered into by employees in any particular unit. The adherence to such commitments would seem to be particularly required in cases such as the present one where there was ample consideration for the commitments and a change in position was

caused thereby. In this case, it must be remembered, the employer opened the warehouses pursuant to the Truce Agreement only at very great cost to itself; the employees were returned to their former positions without discrimination; and the Teamsters' union gave up its right to attempt to organize the employees during the entire period of the Truce Agreement.

The Truce Agreement, sponsored by a group of Seattle civic leaders and agreed to by the unions and the individual employees, reads as follows:

"June 9, 1937.

"In order that the unfortunate jurisdictional dispute between your respective organizations, which has prostrated for months the Bemis Bag Company, the West Coast Kalsomine Company, and three wholesale drug establishments in our city, depriving the employees of those concerns of work and ruining the business of the industries involved, we desire to make the following proposition as a basis for settlement:

"1. That the industries immediately open their plants under guarantees by both unions that the workers will be permitted to return to work, and the products will be hauled and delivered without interference.

"2. That each employee of those concerns return to work under his or her present union affiliations, and that the ILA will appeal from the decision of the Executive Council of the American Federation of Labor to the October convention of that organization, to be held in Denver, Colorado.

"3. That both organizations agree to be bound by the final decision of that convention. The pending suit will be dismissed with prejudice as to all parties.

"4. If no appeal is taken by the ILA to the convention, both unions agree to abide by the present decision of the Executive Council.

"5. This agreement shall become effective when signed by the officers of the unions, and the signing of this agreement by the employees shall entitle such em-

> ployee signing to the same position which he or she held at the time the strike was declared. Such employment to commence as rapidly as work can be provided."

This agreement was signed by the representatives of the unions, both local and regional. Immediately following this agreement was attached the following paragraph, to which the individual employees affixed their signatures:

> "The undersigned employees, fully understanding the within agreement, hereby approve the same and agree to be bound thereby."

Leaving aside for the moment the question of the intent of the parties in the event of secession, it is not disputed or controverted in any way that, had no secession taken place, it was the purpose of the agreement to require compliance with the Convention decision by a change in affiliation in conformance with the Convention designation of jurisdiction. Under normal circumstances, the employees who were members of the Longshoremen's Union would have been obliged to give up their affiliation with that organization and affiliate with the Teamsters' organization. The agreement of the individual employees and of the unions to "abide" by the decision can have no other meaning which would make sense or which would be consistent with the purpose of the entire agreement—to afford a means of finally settling the controversy which had so grievously disrupted the peace of the community and the business of the employer. Thus, the Teamsters, had the agreement been lived up to in spite of the secession, would have the required majority.[2]

[2] The question concerning the duration of the Truce Agreement—whether it was effective for a definite time or a reasonable period of time—was commented but not passed upon by the court below. The Teamsters applied to the Company for the contract within two weeks after the Convention decision. Obviously, if the agreed upon settlement of the dispute would in any way effectuate its purpose—to achieve a final settlement of the dispute—it must have been intended to be effective for a minimum reasonable period of time after the Convention decision (pursuant to which the parties were to change their affiliation) was made, or the agreement would have been meaningless and without effect.

The sole question then, is whether the agreement manifested an intent on the part of the parties that it become inoperative in the event of secession of the I. L. A. local. Before considering the terms of the agreement itself, it is important to note that at the time of entering into the agreement the I. L. A. local and its members signing the agreement knew that there was a great possibility that the local would secede from the International and join the C. I. O. Further, it should be noted that the underlying and fundamental purpose of the agreement was to permanently and finally settle the bitter dispute which had so long disrupted the business of the employer and disrupted the peace of the community (R. 398, 181, 273, 280, 247, 248). The parties, then, knowing this, nevertheless agreed in plain, unequivocal language "to be bound by the final decision of the Convention". This undertaking was made without any reservation or condition whatsoever in the agreement.

Under such circumstances, the applicable principle of contract law is clear. The authorities are unanimous in holding that, where a condition exists which might affect performance of a contract, and such condition is known to the parties to the contract but no exception or provision is made therefor, the parties are presumed to intend that the occurrence of the condition, if it occurs, shall not operate to affect the performance of the contract. The rule has its basis, of course, in the desire to achieve certainty and definiteness in contract relationships where the parties have undertaken to reduce their agreement to writing. The contract must speak for itself, and the courts may not add to a contract that which it does not contain. The rule has been stated by this Court in the leading case of *Chicago, Milwaukee & St. Paul Railway* v. *Hoyt*, 149 U. S. 1, as follows:

> "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay

damages for the non-performance, and such construction is to be put upon an unqualified undertaking, *where the event which causes the impossibility might have been anticipated and guarded against in the contract,* or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." (Emphasis ours.)

A leading Federal decision on the question, in which a number of the Federal cases are discussed, is *Johnson* v. *Igleheart Bros.*, 85 F. (2d) 4:

"It is urged upon us, however, that notwithstanding the want of express language to cover the situation presented, the court should construe the contracts as containing an implied promise to refund to the plaintiff that part of the purchase price which went to make up the processing tax. In other words, we are asked, by construction, to afford the plaintiff protection against a contingency other than that which the parties themselves provided.

"Defendant contends that there can be no implied contract where there is an express contract between the parties relating to the same subject matter, and omissions in a written contract can not be supplied by implications unless the implication results from the language employed in the instrument or is indispensable to carry the intention of the parties into effect. Many authorities are cited in support of this contention."

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"In Robinson *v.* Bowe, 8 Cir., 73 F. (2d) 238, on page 241, it is said: 'In construing a written contract, the court will carry out as far as possible the intention

of the parties, *but is bound by the intention as disclosed by the instrument executed between them.* Albien *v.* Smith, 24 S. D. 203, 123 N. W. 675; Wilson *v.* Lewis, 63 Neb. 617, 88 N. W. 690; Patnott *v.* Simpson & Co., (C. C. A.) 35 F. (2d) 840. *The courts may not add to a contract that which it does not contain nor add thereto that which subsequent events develop would have been advantageous to one of the parties.*"

* * * * * * *

"Other authorities could be quoted to the same effect. It seems clear to us that the law is well settled that where parties expressly contract, under what circumstances an obligation may arise with reference to a certain subject matter, where the same is entered into without fraud or mutual mistake, it excludes the possibility of an implied covenant of a contradictory or different nature. In the instant case, the alleged implied covenant, of course, is not contradictory to those expressly made, but it certainly is different and in addition thereto. There is no claim of fraud or mutual mistake; the parties were dealing at arms' length, and so far as is shown, there was no effort or intention on the part of either to prevent the other from incorporating any provision necessary for the protection of the contracting parties. *If the parties had desired or intended to provide for the contingency here presented, they could, and, no doubt, would have done so. Generalia specialibus non derogant.*" (Emphasis supplied.)

The law of the State of Washington has been stated by its Supreme Court in *McBride* v. *Callahan,* 173 Wash. 609, 24 Pac. (2d) 105, and *Book* v. *Thomas,* 61 Wash. 607, 112 Pac. 917. It is to the same general effect as the foregoing cases.

The court below has chosen to ignore these well accepted canons of contract interpretation. Not only have these principles been ignored, but a directly opposite doctrine has been stated, with no attempt to cite any authority in

support thereof. The court has said that, where the condition which might possibly affect performance is known to the parties and provision could easily have been made against it but the parties have not done so, the court will insert it for them in an otherwise clear and unambiguous agreement. Such a principle of contract construction is at variance with all other reported cases and certainly would be productive of chaos in contractual relationships were it to become the law.

It is obvious from the many paragraphs of discussion in the opinion devoted to the matter that the court below was influenced in its interpretation of the Truce Agreement by the completely incorrect assumption of fact that the International Longshoremen's Association as an international organization had seceded from the American Federation of Labor, and that the A. F. of L. Convention was deciding a dispute between two organizations, one of which was affiliated with a rival group. Further, the court seemed to be under the impression that the Convention was deciding only the particular local dispute involving the five warehouses. Neither of these assumptions are correct, and neither of them were found or contended to be true by the Board in its decision or in its brief. The statements in the decision below respecting the unfairness of submitting a dispute to the A. F. of L. Convention for settlement when one of the contending parties was affiliated with a rival organization, and the lack of power and authority on the part of the Convention, under the A. F. of L. constitution, to attempt to settle such a controversy, are completely irrelevant to this case, because the uncontroverted fact is that the International Longshoremen's Association never did leave the American Federation of Labor—only some of its West Coast locals did so—and that the A. F. of L. Convention did decide the dispute between two strong international unions, both affiliated with it and both contending for jurisdiction. Further, the Convention was not deciding

merely a local controversy involving the five warehouses, but was deciding a national controversy involving jurisdiction to organize throughout the entire United States.

The court below further sustains its interpretation of the Truce Agreement by reference to an extraneous document submitted for signature to the employees at the other three of the five warehouses, but not submitted for signature and not known to the employees at the two warehouses in question. This document, obviously designed to clarify the Truce Agreement and to establish the intent of the parties in the event of secession beyond any shadow of doubt, stated that in the event of secession the employees would, nevertheless, abide by the decision of the Convention. It was not submitted to the employees of the two warehouses in question through inadvertence, and these employees had no knowledge of it whatsover (R. 507-508). Likewise, the employer had no knowledge of this supplemental agreement. How this agreement could be indicative of the intent of persons who had no knowledge of it the court below does not attempt to explain. So far as indicating the intent of the Teamsters is concerned, the supplemental agreement would more reasonably indicate an intent that the parties be bound regardless of secession, rather than that the parties did not intend to be bound in the event of secession, for, certainly, requiring this agreement was only a means of making doubly certain that that object was to be obtained. The court does not attempt to explain why the Teamsters should intend compliance with the agreement, regardless of secession, with respect to the employees at three of the warehouses and should not intend it at the two others; and surely, the intent to be bound by the decision in all events is more consistent with the underlying desire of the parties to finally and permanently end the long-drawn-out controversy. Reliance by the court below on the supplemental agreement, not submitted or known to the individual employees or to the employer, in support of its

finding of the intent of these employees not only violates all principles of contract law but is in violation of common sense.

Assuming we are permitted to go outside the provisions of the Truce Agreement itself, which, in view of its lack of ambiguity, we probably are not, there is other very compelling evidence in the record respecting the intent of the parties which the court below has disregarded.

That Local Union 38-117 of the I. L. A. and its members, signatories of the Truce Agreement, intended to abide by the provisions of that agreement and the decision of the convention of the American Federation of Labor at the time of entering into the agreement is clearly established by the testimony of Bradshaw, the Board's chief witness, at page 273 of the record:

> "Q. And when you made those proposals did you intend and did the union intend to abide by the decision of the convention?
>
> "A. At that time we were in the A. F. of L. We are not in the A. F. of L. now.
>
> * * * * * * *
>
> "Q. Then you did intend to abide by the decision.
>
> "A. That is right."

(See also Bradshaw's testimony on pages 279 and 280 of the record.)

It is clearly established that the company intended the agreement to be binding in all events, for otherwise it would never have reopened the two warehouses involved in these proceedings. As stated by Mr. Gertridge, McKesson & Robbins' manager of the Stewart-Holmes Division (R. 398):

> "Q. * * * did you understand this (Truce Agreement) to be a final settlement of this jurisdictional dispute?
>
> "A. I certainly did.

"Q. Would your firm have considered reopening its plant at that time if it had not been so considered?

"A. We would not have opened our plant."

And that it was the intention of the Teamsters' union that the Truce Agreement should be binding, even if the I. L. A. might subsequently withdraw from the American Federation of Labor, is established by the insistence of Beck, the Teamsters' representative, that a supplemental agreement be signed emphasizing this intent (R. 380-381).

Finally, that the Citizens Committee which drafted the Truce Agreement intended it to be binding on the parties without reservation is established by the letter of the Committee (signed by E. B. Fish) to the company, announcing the decision of the A. F. of L. convention and expressing gratification that the labor difficulties of the company had been terminated (R. 176-178).

Surely, the foregoing, especially in the absence of the testimony of one witness to the effect that it was the expressed intention of the parties that the terms of the Truce Agreement would not be binding in the event of the severance of affiliation of any party from the American Federation of Labor, establishes the intentions of the parties at the time the Truce Agreement was consummated.

It is submitted that the court below has so far departed from applicable principles of the law of contract construction as decided by this Court, by the Federal circuit courts, and by the Washington Supreme Court as to warrant and require this Court to intervene.

III.

There is no evidence and no policy of the Act to support the Board's order forbidding the employer from dealing with the Teamsters as the representative of "any" of its employees.

There is no evidence and no finding offering any basis for the Board's order requiring the employer to refrain from dealing with or recognizing the Teamsters' union as the representative of *any* of its employees at the two warehouses in question. Even the evidence submitted by the C. I. O. did not attempt to show that the C. I. O. represented all of the employees at the two warehouses in question, and the Board did not find that the C. I. O. was entitled to be the exclusive bargaining agent as the representative of the majority. The Board specifically found that the Teamsters' union represented at least some of the employees at the two warehouses in question on November 15th (R. 519). Further, the Board makes the specific finding in the Representation proceeding that "there is doubt" as to the desire of the employees at each of the five warehouses. (5 N. L. R. B. 70, at page 85.) Finally, the only unfair practice with which the employer was charged or concerning which it was convicted was that it had made an exclusive closed-shop contract covering all of the employees with an organization that represented only a minority.

Accordingly, the Board's order denying the Teamsters the right to represent any of its members at the two warehouses in question is in complete disregard of (1) the Board's own findings in both the representation and complaint cases, (2) the results of the election, (3) the fact that the only unfair practice of the employer was in dealing with a minority group, (4) the fact that there is no evidence and no finding that the employer assisted the Teamsters in obtaining all of its members, (5) the fact that

no other organization was certified as exclusive representative for all of the employees.

Certainly, no policy of the Act requires that an accredited labor organization, not company dominated or maintained, refrain, under the circumstances in this case, from dealing with the employer for those employees who are members of that organization. Unless the facts show and the Board finds that the employer assisted the organization by unfair practices to obtain *all* of its members, we cannot imagine, nor has the Board suggested, any policy of the Act that would be effectuated by the present order denying the Teamsters or those employees who are members of the Teamsters any and all rights at the warehouses in question.

This Court has characterized a very similar attempted assertion of power by the Board as punitive in the case of *Consolidated Edison Company* v. *National Labor Relations Board,* 59 Sup. Ct. 206. The following language of that case is directly applicable to the present order denying the Teamsters the right to represent any of its members:

> "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under Section 7 the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collectively through representatives of their own choosing. The 80 per cent of the employees who were members of the Brotherhood and its locals, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. Nothing that the employers had done deprived them of that right. Nor did the contracts make the Brotherhood and its locals exclusive representatives for collective bargaining. On this point the contracts speak for themselves. They simply constitute the Brother-

hood the collective bargaining agency for those employees who are its members."

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"Instead it is left as a matter of mere conjecture to what extent membership in the Brotherhood was induced by any illegal conduct on the part of the employers. The Brotherhood was entitled to form its locals and their organization was not assailed. The Brotherhood and its locals were entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. To say that of the 30,000 who did join there were not those who joined voluntarily or that the Brotherhood did not have members whom it could properly represent in making these contracts would be to indulge an extravagant and unwarranted assumption. The employers' practices, which were complained of, could be stopped without imperiling the interests of those who for all that appears had exercised freely their right of choice."

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"The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act."

It is obvious that the Board's order requiring the employer to refrain "from dealing in any manner" with the Teamsters is directly contrary to the holding of this Court.

Conclusion.

It is submitted that the decree herein of the United States Court of Appeals for the District of Columbia is in error and should be reversed, and it is respectfully urged that the Court grant the writ of certiorari petitioner seeks herein.

Respectfully submitted,

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